

The Polish Senate under Opposition Control

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2019-10-18T10:12:46

The Law and Justice party, having won an absolute majority of Sejm (lower house) seats in the recent parliamentary elections, will continue to govern Poland for the next four years. This news must have come as a great disappointment to those many people who have put so much time and effort into defending the rule of law in Poland against the many depredations perpetrated by the Law and Justice party over the past four years. Any hope that the democratic opposition would be able to regain power and return Poland to the rule of law has been dashed.

However, the Law and Justice party's success in maintaining power is not unqualified. First, the party severely depleted Poland's resources in an attempt to gain the two-thirds Sejm supermajority required to amend the constitution. Several billion euros have been spent on lavish social programmes and more than 300 million euro have been invested in the public media, which have been transmogrified into a blatant propaganda machine for the governing majority. The opposition and NGOs have been bullied almost every day on social media, and critics have been subjected to lawsuits. All this has achieved precisely nothing. Law and Justice has an even slimmer Sejm majority than it did after the 2015 election. Not only can they not amend the constitution, they cannot even override presidential vetoes.

Second, and more importantly, Law and Justice lost its Senate (upper house) majority. Law and Justice now has 48 of the 100 Senate seats. The opposition, with the support of four independents, can control the chamber, although this is by no means a given. At this stage, these four seem set to join forces with the democratic opposition, but there is always the threat that Law and Justice may try to buy them off. One of them has just announced that he was offered the Health portfolio in exchange for supporting the party in the Senate. He turned down the offer, but the proposal speaks volumes. Law and Justice's preparedness to use healthcare as a bargaining chip to control the Senate, shows that absolute power is more important to them than the wellbeing of the citizenry.

The opposition will not be able to prevent Law and Justice from continuing to dismantle the rule of law in Poland, even in the event that it does control the Senate. The Senate can debate, propose amendments to, and even reject, draft bills proposed by the Sejm. The Sejm, however, can reject any amendments and override any rejections. Law and Justice obviously has the numbers to this. What the Senate can do, however, is slow down the legislative process through debate and deliberation.

These two things have been almost completely absent in parliamentary proceedings over the past four years, when Law and Justice ran what Supreme Court justice Stanisław Zablocki referred to as a 'legislative Pendolino'. The reference to

the Italian fast train was meant as a criticism of the insanely rapid tempo of parliamentary proceedings under Law and Justice. Their (infamous) record was 8 hours from introducing a bill into the Sejm, to getting it passed by the Senate and obtaining presidential assent. This unwarranted haste resulted in many contradictions, inconsistencies and ambiguities, and the complete lack of parliamentary debate and public consultation did not allow for highlighting the flaws of the proposed legislation to the general public. If it controls the Senate, the opposition will be able to debate bills for at least 30 days (or 14 in the case of urgent legislation) and give the floor to experts and NGOs, whose input has not been sought, let alone considered, at all over the past four years. Finally, the Polish parliament buildings, which have been surrounded by an iron fence at the behest of the Law and Justice Sejm speaker, will once again be open to ordinary citizens who want to be involved in the legislative process.

There are five more ways in which the Senate can make Polish public life more civilised. First, some important public figures have to submit their reports to the Senate and can be interrogated by it. These include the President of the Constitutional Tribunal and the head of the National Broadcasting Council (the media watchdog). Given that both the constitutional court and the public media have been commandeered by Law and Justice, those sessions in which the Senate will be discussing their reports will provide an opportunity to expose and challenge the dubious practices of those two bodies, and to reveal how they actually function (or not function, to be more precise).

Second, the Polish Senate is involved in appointing the ombudsman and has the right to appoint some members of the National Judiciary Council and the National Broadcasting Council. The terms of office of these two councils expires in three years, and a new ombudsman will be appointed next year, at the end of Adam Bodnar's term of office. This means that the opposition will be able to reject any successor nominated by Law and Justice. In addition, the ECJ is expected to deliver its judgement on the National Judiciary Council in the very near future. Should it prove disadvantageous to the Polish government, the Senate may invoke its right to appoint two new members to the council to rebuild its status and reputation.

Third, the Senate can appoint special committees, dedicated to particular issues of public importance. While these committees cannot have prosecution competences (as can Sejm special committees), they can compel the provision of information and publicly discuss issues that the governing party would prefer to have swept under the carpet. This is designed to make public life more transparent and to give the public a better understanding of what is really happening.

Fourth, Senate approval is required to amend the Constitution. Amending the Constitution has long been a dream of Jaroslaw Kaczynski, Poland's de facto leader. And he might yet realise it, even without the required supermajority, by means of legal skulduggery (e.g. by tricking the opposition into missing a Sejm sitting, as Pi#sudski's supporters did to enact a new constitution by surprise in 1935). This will not be possible, however, if the Senate is under the control of the opposition.

Last, but by no means least, the Senate, in conjunction with the President, can also organise a national referendum. This might come in handy in the event that an opposition candidate wins the presidential election next year. The hope is that the first referendum questions would be “Are you opposed to the assaults on the rule of law?” and “Do you demand an immediate cessation of the attacks on the independence of the judiciary?”. It would be good to see the faces of the Law and Justice leaders sweating on public TV, trying to explain to the people of Poland that affirmative answers to these questions are not binding on them.

Will Rogers once quipped that the US Senate opens with a prayer and closes with an investigation. The new Polish Senate, under the control of the liberals and the leftists, will most likely not be opening with a prayer. However, it just might close with a transparent, public investigation aimed exposing all those responsible for dismantling and disregarding the rule of law in Poland. Jarosław Kaczyński is well aware of this, which (at least in part) explains his crestfallen face on election night last Sunday.

